UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

PPL EnergyPlus, LLC
Complainant

v. Docket No. EL06-72-000

New York Independent System Operator Inc.
Respondent

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINT

(Issued June 29, 2006)

1. On May 15, 2006, PPL EnergyPlus, LLC (PPL) filed a complaint against New York Independent System Operator, Inc. (NYISO), alleging that the NYISO violated its Market Administration and Control Area Services Tariff (Services Tariff) and relevant procedures and manuals when it allocated available import capacity rights for the summer 2006 capability period. For the reasons discussed below, the Commission grants in part, and denies in part, the complaint made by PPL and requires NYISO to revise its procedures to address the problems raised in this proceeding.

Background

2. The complaint arises from the external installed capacity (ICAP) import rights allocation process for the summer 2006 capability period that was conducted by the NYISO on February 16, 2006. Each load-serving entity in the New York control area is assigned minimum ICAP requirements that can be met by self-supply or by purchase of unforced capacity.[1] Load-serving entities may procure unforced capacity from outside the New York control area. Once the NYISO determines the amounts of unforced capacity that may be imported, it implements procedures for the sale and delivery of this

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[1] Unforced capacity is based on ICAP after accounting for a generating facility's historical outage performance.

external ICAP. The Services Tariff notes that external ICAP must be deliverable using import rights. The Services Tariff also specifies that procedures for the allocation of external ICAP import rights are set forth in the ICAP Manual, which has been reviewed and approved by market participants through the NYISO governance process.

3. As specified in the ICAP Manual, the allocation process offers import rights for individual months over a six month capability period (summer or winter) on a first-come-first-served basis. The awarded rights allow a market participant to use constrained transmission tie lines between the NYISO and adjoining regions to import ICAP into the NYISO control area. During the allocation process, if the first valid request does not claim all of the available import rights, then the next successful request will receive any remaining rights until all rights are allocated. Entities receiving external ICAP import rights must designate the load to be served and generation to be used each month during the six-month period.

4. Of particular relevance to this proceeding, ICAP Manual section 4.9.2, entitled "Allocation of Import Rights," under the subheading "Request," specifies that, for the summer capability period, requests for import rights are to be sent to the NYISO "[b]eginning at 8:00 AM ET . . . on the first business day following the publication of the total number of import rights made available by the NYISO." Later, under the subheading "Priority," section 4.9.2 specifies that "[o]nly complete requests submitted within the time periods specified above will be evaluated by the NYISO. The date and time stamp provided by the FAX machine will determine the priority for the evaluation of requests."

5. The external ICAP import rights allocation conducted on February 16, 2006, made available the right to import 220 MW into NYISO markets from PJM Interconnection L.L.C. for the 2006 summer capability period. PPL sent a request to NYISO by fax, and later learned that NYISO had awarded all available rights to Coral Power, L.L.C. (Coral). The fax log, which lists the date and time of faxes NYISO received for the February 16, 2006 external ICAP import rights allocation, indicates that NYISO received Coral's bid at 7:59 AM.

6. After learning of the fax log, PPL unsuccessfully attempted to resolve its dispute bilaterally with NYISO and through discussions facilitated by the Commission's Enforcement Hotline.

PPL's Complaint

7. PPL's complaint alleges that NYISO improperly approved Coral's premature request and that its own request was the first valid request submitted to NYISO. PPL argues that NYISO acted in an unduly discriminatory manner and in violation of its rate schedule on file when it failed to conduct the import rights allocation for the summer

2006 capability period in accordance with the Services Tariff, the procedures set forth in the ICAP Manual, and Commission precedent.

8. PPL makes several arguments based on the language of the Services Tariff and the ICAP Manual. First, PPL argues that NYISO did not receive a timely request from Coral, since, according to NYISO's own fax log, Coral's request was received at 7:59 AM, before the start of the allocation process.[2] Rather, PPL's own request, which the fax log shows received at 8:01 AM, should be considered the first valid request. PPL further argues that its reading of the ICAP Manual, which would require that NYISO's fax log be used to determine whether a submitted request was timely is supported by a NYISO publication for market participants. That publication, the *NYISO Insider* dated February 13, 2004, described an allocation process set to take place on February 17, 2004, and explained that a submitted request could be rejected for several reasons, including that the "[r]equest is received prior to 8:00 AM ET on February 17, 2004; the date and time stamp provided by the FAX machine described above is used for this determination."

9. Second, PPL argues that, because Coral failed to submit a timely bid, it failed to comply with NYISO procedures and, as a result, could not be considered an Installed Capacity Supplier qualified to receive an allocation of external rights.[3] Third, PPL maintains that NYISO's failure to follow its own procedures is unduly discriminatory and a violation of the Services Tariff. Finally, PPL argues that NYISO improperly applied a new means for determining timely requests. PPL cites to a letter it received from the NYISO explaining that NYISO's personnel turned on the fax machine when "cellular telephone time" indicated that it was 8:00 AM ET.[4] PPL notes that this approach eliminates the independent means of verifying the first timely fax received (such as is provided by a fax log) and places too much discretion in the hands of NYISO personnel. Moreover, PPL argues, this new procedure is not stated in the Services Tariff or ICAP Manual, and had not previously been made known to market participants.

10. PPL seeks several remedies. PPL requests that the Commission determine it was inappropriate for NYISO to grant Coral's request despite the provisions of the Services

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[2] PPL notes that the Services Tariff requires that bids be "duly submitted." New York Independent System Operator, Inc., FERC Electric Tariff, Original Volume No. 2, Seventh Rev. Sheet No. 28, section 2.12.

[3] New York Independent System Operator, Inc., FERC Electric Tariff, Original Volume No. 2, Fourth Revised Sheet No. 130, section 5.12.1(viii).

[4] Undated Letter from Kathy Whitaker, Manager, Auxiliary Market Operations, NYISO, to Brent Shaefer of PPL, Attachment C to PPL's Complaint.

Tariff and ICAP Manual. PPL also requests that it be awarded the import rights as of June 1, 2006 as the first-in-time bidder. PPL argues that NYISO can correct its initial wrongful allocation by awarding PPL the rights for each remaining month of the summer capability period because the load served in this auction is re-designated on a monthly basis.

11. Next, PPL asks the Commission to remedy the alleged economic harm PPL suffered as a result of the NYISO's failure to properly implement its tariff and market rules in connection with the summer 2006 import rights allocation, which it estimates at approximately $2 million based on available price data and projections. PPL also argues that it should be held financially harmless for the erroneous award before the Commission takes action on its complaint.

12. Finally, PPL seeks that the Commission direct NYISO to conduct a stakeholder process to reform the NYISO process of awarding external rights. The stakeholder process would conclude with the NYISO making a compliance filing with the Commission to rectify the flaws in the current process, such as replacing use of the fax system with a better and updated technology and considering alternatives to the current "winner takes all" allocation.

Notice of Filing and Responsive Pleadings

13. Notice of the complaint was published in the *Federal Register*, 71 Fed. Reg. 29,935 (2006), with comments, interventions, and protests due on or before May 25, 2006. Upon request for extension by NYISO and Coral,[5] the comment deadline was extended to May 31, 2006. On May 25, 2005, Edison Mission Energy and Edison Mission Marketing & Trading, Inc. filed a motion to intervene. On May 30, 2006, the New York Transmission Owners filed a motion to intervene.[6] NYISO filed an answer in opposition to the Complaint. Coral filed a protest and response to the complaint. On June 15, 2006, PPL filed an answer to NYISO's answer and Coral's protest and response, and on June 23, 2006 Coral filed an answer in response to PPL's answer.

[5] Coral's request for extension dated May 19, 2006, also included a motion to intervene.

[6] New York Transmission Owners comprise: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a/ National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

Answer and Protest

14. NYISO and Coral argue that PPL's complaint is without merit and the Commission should deny it. NYISO and Coral principally argue that NYISO complied with the requirements of the Services Tariff[7] and ICAP Manual during the February 16 import rights allocation and appropriately allocated the transmission capacity at issue to Coral.

15. NYISO maintains that its use of an official time source to determine when to start receiving requests was appropriate. Section 4.9.2. of the ICAP Manual, NYISO argues, under the heading "Requests," states that requests for import rights may be sent to the NYISO beginning at 8:00 AM ET, but does not specify the means by which NYISO will determine that 8:00 AM ET has arrived. NYISO states that it used an objective and reliable source of time – i.e., the official time as determined by the United States government[8] – to determine when to start the allocation process. In an affidavit, Peter Morrison of NYISO explains that on the morning of February 16, 2006, he monitored the time using a time display provided by a cell phone provider and reconnected the NYISO fax machine when the cell phone indicated that 8:00 AM ET had arrived.[9] NYISO further argues that in section 4.9.2, under a separate heading "Priority," the ICAP Manual states that the fax machine's date and time stamp will be used to "determine the priority for the evaluation of the requests." This "Priority" provision, NYISO continues, does not refer to the "start time provision" or otherwise indicate that the fax time stamp should be used to determine when the start time has arrived. Hence, maintaining that the concept of "start time" (or commencement) is different from the concept of "priority." NYISO argues that PPL's attempt to combine and blur these two "distinct and widely separated provisions" has no basis in the plain reading of the Services Tariff or ICAP Manual. Coral makes a similar argument.

[7] Coral argues that some of the tariff provisions PPL cites apply only to the requirements for installed capacity auctions administered by the NYISO, which are different from the capacity import rights allocation at issue in this proceeding. Coral nevertheless agrees that the ICAP Manual contains the relevant procedures for the capacity import rights allocation at issue here.

[8] The official time, as well information regarding its derivation and history, can be found at http://www.time.gov.

[9] Mr. Morrison further states that NYISO has verified that the time on the cell phone is synchronized to official time.

16. NYISO and Coral further argue that NYISO acted properly when, to comply with section 4.9.2, it disabled the fax machine and then re-enabled it at 8:00 AM ET official time.

17. NYISO argues that public policy considerations support commencing the allocation process based on a publicly available time source, citing Order No. 676,[10] in which the Commission incorporated by reference a North American Energy Standards Board Wholesale Electric Quadrant standard that requires that time on OASIS nodes be synchronized with official time.

18. NYISO maintains that the filed rate doctrine prevents the NYISO newsletter from controlling how NYISO must determine the start time of an auction.[11] NYISO also objects to the characterization that the use of an official time source represented a change in procedure since neither the Services Tariff nor the ICAP Manual state that the fax machine time statement will be used to determine whether a request was timely submitted.

19. Coral argues that the newsletter applied only to the February 2004 allocation, not the February 2006 allocation, and it is not part of the filed rate. It also states that the NYISO exercised no discretion in allocating the capacity import requests because the fax machine time stamp remains the final and objective arbiter of the allocation since it determines the priority in which the requests were received. Furthermore, Coral continues, NYISO reasonably relied on the official time as provided by a cellular telephone to determine when to bring its fax machine into service.

20. Assuming for the sake of argument that the Commission grants the complaint, NYISO and Coral object to all but one of the remedies proposed by PPL. NYISO and Coral argue that the Commission should exercise restraint in fashioning a remedy here, since the alleged violation did not result in unjust and unreasonable rates or unjust enrichment.[12] A re-allocation to PPL, NYISO continues, would harm Coral which relied

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[10] *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676, 71 Fed. Reg. 26199 (May 4, 2006), FERC Stats. & Regs. ¶ 31,216 (2006).

[11] *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1977) ("[U]nder the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls.").

[12] NYISO cites two cases that involved the NYISO. *New York Independent System Operator, Inc.*, 110 FERC ¶ 61,244 at P 70 (2005); *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,154 at 61,673 (2001).

on NYISO's allocation determination to plan its summer trading activities. Coral itself argues that it reasonably relied on the allocation and has entered into a contract with a load serving entity in the New York control area.[13] Coral continues that, given this reasonable reliance, it should not be forced to suffer financial harm for complying with the applicable rules governing the allocation and following the Services Tariff and ICAP Manual.

21. NYISO and Coral also object to PPL's request that it be held harmless, since such an outcome would unreasonably harm NYISO market participants. NYISO argues that the Commission previously has declined to order a remedy when a tariff violation had beneficial effects,[14] and here the use of an objective, transparent methodology that uses official time brings certainty and operating precision to the market. Coral argues that neither the Services Tariff nor the ICAP Manual permits retroactive remedies or reversing of allocations.

22. NYISO argues that doctrine of laches[15] should be used to bar PPL's request for relief, since PPL delayed the filing of its complaint until two weeks after the summer 2006 capability period began. NYISO notes that PPL provides no explanation why it waited so long to file a complaint. Although PPL made use of the Commission's Enforcement Hotline, NYISO continues, PPL knew it should have filed a complaint to preserve its rights before May 1 to allow time for response.[16] NYISO argues that the delay has caused undue prejudice to the NYISO, Coral, and New York market participants in general.

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[13] Coral alleges that it first learned of a dispute regarding the summer 2006 capability period and NYISO's administration of the allocation on April 4, 2006. Motion to Intervene and Request for Extension of Time to Answer and Shortened Answer Period at 5 (May 19, 2006).

[14] NYISO cites *Louisiana Public Service Comm'n v. FERC*, 174 F.3d 218,225 (D.C. Cir. 1999).

[15] "Under the doctrine of laches, a claim in equity can be barred if the person bringing the claim has delayed for such a time that permitting it to prosecute the claim would be inequitable." *Jack J. Grynberg*, 90 FERC ¶ 61,247 at 61,826, *reh'g denied*, 93 FERC ¶ 61,180 (2000).

[16] Relief that reallocates the rights to PPL could be granted at the beginning of any month during the summer capability period, NYISO argues, but the full relief requested that grants 220 MW of external rights to PPL for the entire summer capability period would have required a complete resolution prior to May 1, 2006.

23. Coral alleges that the only conclusion that can follow from balancing the equities in this case is that it retain the capacity import rights properly allocated to it for the remaining term of the summer capability period. If the Commission were to reverse the allocation, Coral continues, the finality of all previous capacity import rights allocations would be called into question and could result in costly litigation by disgruntled allocation participants.

24. Finally, neither NYISO nor Coral oppose PPL's request that the NYISO undertake a stakeholder process to consider improvements to the external ICAP import rights allocation process.

Discussion

Procedural Matters

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to an answer or a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept PPL's or Coral's answers and will, therefore, reject them.[17]

Commission Determinations

26. The Commission concludes that NYISO has violated its tariff by allocating capacity import rights to Coral for the summer 2006 capability period. However, the Commission will deny the requested relief except to require NYISO to revise its allocation procedures.

27. We agree with PPL that a plain reading of section 4.9.2. of the ICAP Manual provides that the fax machine time stamp is to be used to determine the 8:00 AM start of the auction and thus whether a request is timely. We reach this conclusion for several reasons. First, the reference to the fax log in section 4.9.2 indicates that the fax clock will be used to determine the timeliness of requests; thus, it was reasonable for PPL to conclude that the fax log would be used for this purpose. We do not find dispositive the fact that the discussion of the start time of the auction is not explicitly linked to the fax

[17] In its answer, PPL for the first time notes that the contract Coral was required to enter into to be eligible for the allocation was contingent upon Coral receiving the allocation. Even if we were to admit the answer, this information would not change the outcome because Coral met this contingency.

log. Nor do we interpret the use of the term “priority” as excluding “validity,” because there is no basis for such a distinction in section 4.9.2. Further, the Commission recognizes that the fax time stamp used by NYISO to determine priority provides a reasonably objective standard upon which market participants can expect their timely bids to be considered.

28. We reject Coral and NYISO’s arguments alleging that it was reasonable to conclude that NYISO would use “official time.” Simply put, nothing in the Services Tariff or the ICAP Manual provides a basis for this belief. Under NYISO’s interpretation of the ICAP Manual, the customer can rely on the accuracy of the fax time log for priority of bids, but not for the timeliness of bids. Yet the ICAP Manual makes no such distinction, and it is unreasonable and illogical to expect that the customer would know, based on the Services Tariff and the ICAP Manual, that NYISO would use a different means for determining timeliness.

29. In fact, our conclusion that the ICAP Manual uses the fax time stamp to determine timeliness is consistent with NYISO’s own previous interpretation of the manual in the February 13, 2004 issue of the *NYISO Insider*. There, the NYISO explicitly stated that the fax time stamp would be used to determine whether a request was timely. Coral and NYISO claim that the February 13, 2004 *NYISO Insider* is a poorly worded, non-technical newsletter that does not trump or supersede the standards and requirements of the filed rate. While we agree that the *NYISO Insider* cannot be considered part of the filed rate, here we conclude that the *NYISO Insider* interpreted the ICAP Manual in a manner consistent with the filed rate and, furthermore, it is reasonable for PPL to rely on NYISO’s own statements, submitted in a newsletter that it publishes, as to the NYISO’s own interpretation of how section 4.9.2 operates. It is unfair to market participants to assume that interpretations made by NYISO in its own publications regarding the ICAP Manual, and highlighting topics such as priority and bid evaluation, cannot be regarded as coming from a credible source. When publishing informational documents for its market participants, NYISO has a responsibility to ensure that these documents are consistent with the Services Tariff and procedures. Furthermore, we question whether NYISO’s reliance on the time provided by a cellular phone provider is any more “official” than the time on the fax clock. Finally, while it may be reasonable for NYISO to establish an official source for determining when to begin the allocation, it is NYISO’s responsibility to ensure that all such clarifications or modifications are incorporated into its Services Tariff and ICAP Manual so that all market participants may be aware of the standard that will be used.

30. Although we conclude that NYISO violated its tariff, the Commission denies PPL’s request to be awarded the capacity import allocation for the remainder of the 2006 capability period as of June 1 and its request for monetary damages for the pre-June 1

period.[18] The Commission will craft a remedy tailored to the violation at hand and need not require retroactive refunds.[19] In this proceeding, the Commission must balance the goals of allowing PPL relief based upon the nature of the violation and PPL's assumed injury while at the same time ensuring that granting such relief will not undermine confidence in markets. The entity that benefited from the tariff violation, Coral, reasonably made arrangements for the capability period it was awarded and would be financially harmed by a re-allocation of its capacity import rights. Therefore, the Commission concludes that it would be inappropriate to grant PPL either the capacity or the refund remedy it requests.

31. In light of the apparent lack of transparency in the external ICAP import rights allocation process, we will require the NYISO to propose within 60 days of the date of this order improvements to the process and revisions to the ICAP Manual so that both the requester and NYISO know when an allocation process begins. NYISO shall also consider whether external rights should be awarded on a pro rata basis among all bidders who submit bids within some interval rather than continue the allocation on an "all or nothing" basis.

<u>The Commission orders:</u>

(A) PPL's complaint is hereby granted in part and denied in part, as discussed in the body of this order.

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[18] The Commission generally agrees with Coral and NYISO that in the cases cited by PPL in which capacity was misallocated, the Commission provided only prospective relief and did not require that the complainant be held harmless. *E.g.*, *Tenaska Power Services Co. v. Midwest Independent System Operator, Inc.*, 102 FERC ¶ 61,095 at 61,259-60, *order on clarification*, 103 FERC ¶ 61,049, *order on reh'g*, 104 FERC ¶ 61,075 (2003); *Idaho Power Co. v. PacifiCorp*, 95 FERC ¶ 61,148 at 61,476-77 (2001); *Morgan Stanley Capital Group v. Illinois Power Co.*, 83 FERC ¶ 61, 204 at 61,913, *order on clarification*, 83 FERC ¶ 61,299 (1998), *order on reh'g*, 93 FERC ¶ 61,081 (2000).

[19] *E.g.*, *New York Independent System Operator, Inc.*, 110 FERC ¶ 61,244 at P 70 (explaining that, "in balancing the equities," refunds for a tariff violation should not be required), *order on reh'g*, 113 FERC ¶ 61,155 (2005); *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,154 at 61,673-74 (2001) (denying refunds because no customer paid an unjust and reasonable rate as a result of the tariff violation and the Commission had chosen a remedy that was effective and fair under the circumstances).

(B) The NYISO is hereby directed to submit a filing within 60 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioners Kelly concurring with a
separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PPL EnergyPlus, LLC
Complainant

v. Docket No. EL06-72-000

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(Issued June 29, 2006)

KELLY, Commissioner, *concurring*:

I write separately because, while I agree with the majority's decision not to take this import capacity away from Coral and award it to PPL, I would have also rejected PPL's arguments for why such relief is required.

I do not believe that the language of the ICAP Manual itself supports PPL's interpretation. The only sentences that appear to mention the fax time stamp[1] are in the "Priority" subheading of the ICAP Manual and only speak to priority, not whether or not the request is accepted or rejected. Even the prior sentence in this subheading[2] makes clear that the actual specification of acceptable time periods is reserved for the earlier "Request" subheading of the ICAP Manual. The "Request" subheading, in turn, states only that the start time will be "8:00 AM ET" and no apparent mention is made of the internal fax clock or any other non-standard means of determining when 8:00 AM ET actually occurs. In the absence of such a discussion in this subheading, one must assume that an "official" measure of time would be needed, just as NYISO argues on reply. Accordingly, I disagree with my peers that a "plain reading" of these provisions of the ICAP Manual supports PPL's complaint. In my mind, NYISO's interpretation in its reply comments is just as easily, if not more easily, supported by these ICAP Manual provisions.

If I am correct, then only by taking into account the extrinsic evidence of NYISO's earlier interpretation, as reflected in the February 2004 *NYISO Insider*,

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[1] "The date and time stamp provided by the FAX machine will determine the *priority* for the evaluation of requests. If a request is resubmitted for any reason, the latest time stamp will determine its *priority*."(emphasis added)

[2] "Only complete requests submitted within *the time periods specified above* will be evaluated by the NYISO."(emphasis added)

can one find that the requirements of the ICAP Manual were violated here. However, in my judgment that earlier interpretation would lead to extremely unreasonable results if the time set into the fax machine was permitted to diverge from the actual, “official” time, as appears to be the case here. If the internal fax clock is not keeping actual time, and yet takes precedence over actual time in determining when to begin accepting requests, then parties would have no way of knowing exactly when they could first submit their requests. Since this allocation procedure permits the first request in the door to take all of the available and highly valuable import capacity, knowing the exact start-time is of vital importance. Since NYISO’s 2004 interpretation would seem to require parties to race for that first request slot without knowing until much later when the official start actually occurred, that interpretation appears so unreasonable to me that it should be accorded very little weight. Based on the actual language of the ICAP Manual, and with very little weight given to the extrinsic evidence of NYISO’s now-abandoned 2004 interpretation, I would have found that NYISO acted in conformance with its ICAP Manual.

That said, I do agree with the majority and with PPL that NYISO should consider whether the current first-come-first-served, winner-take-all methodology should be replaced by a more rational method of allocating this scarce, very valuable import capacity.

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Suedeen G. Kelly